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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,
Appellant,

vs.

J. ALICE STELLING,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

GROUNDS OF PETITION.

Comes now the above named Appellant, and presents this, his Petition for a Rehearing of the above entitled cause, and in support thereof respectfully shows:

1. That neither of the two authorities cited in the Order Granting the Motion to Dismiss and Dismissing the Appeal is pertinent.

2. The opinion of the Court below strikes from the tender prohibition one-half its force by holding, in effect, that it means: "No state shall make anything but gold and silver coin a tender in payment of unsecured debts." This new and extraordinary interpretation alone justifies a hearing on this very important federal question.

3. Congress has power to make, and has made, national money the exclusive medium for paying all unsecured and secured debts. The state statute attacked herein provides that "When a money judgment is sought" for the balance due after a trustee's sale, a valuation of the real estate may be substituted for money in paying or cancelling that obligation to pay money. The conflict is plain.

4. This constitutional plan of making debts payable only with money is the honest and just plan and until now has never been departed from since the Constitution was adopted. The use of local valuations as a substitute for money in paying debts always has and always will cause immense and unjustifiable losses. The contest herein is: National sovereignty vs. state sovereignty as to the medium for paying future debts.

ARGUMENT.

1. THAT NEITHER OF THE TWO AUTHORITIES CITED IN THE ORDER GRANTING THE MOTION TO DISMISS AND DISMISSING THE APPEAL IS PERTINENT.

There are but two authorities cited by the Court in its Order Granting the Motion to Dismiss, etc.,

to wit: *Honeyman v. Jacobs,* 306 U. S. 539, and *Richmond Mortgage & Loan Corp. v. Wachovia B. & T. Co.,* 300 U. S. 124. What was the sole point involved in these cases? The Chief Justice answers this question as to the first case in the very first sentence of the Opinion therein, viz.:

> "This case, coming here on appeal from the state court, presents the question of the validity under the *contract clause* of the Federal Constitution of Sec. 1083-a of the Civil Practice Act of New York. * * *." (Italics ours throughout.)
>
> *Honeyman v. Jacobs,* 306 U. S. 539 at 540.

Mr. Justice Roberts answers this question, as to the said second case cited, in the first sentence of the Opinion, viz.:

> "This is an appeal from a judgment of the Supreme Court of North Carolina sustaining the validity of a statute *claimed to impair the obligation of a contract,* * * *."
>
> *Richmond Mortgage & Loan Corporation v. Wachovia B. & T. Co.,* 300 U. S. 124 at 126.

The conclusion is inescapable from the language quoted from said two cases that the sole point involved, considered, and decided was the *contract clause* of the Federal Constitution!

The contract clause is not involved in the instant case. At no time did appellant contend that Section 580a of the California Code of Civil Procedure violated the contract clause.

Appellant did and does claim that said Section 580a violates the *legal tender clause* of Article I, Section 10, of the Federal Constitution.

The tender prohibition on the states is of a very different nature from the contract clause and was inserted for very different reasons. This Court in *Home B. & L. Assn. v. Blaisdell,* 290 U. S. at 426, speaking through Chief Justice Hughes, states that the tender prohibition is of the same nature as the prohibition against state coinage of metals into money and that the contract clause is of a different nature and meaning.

Madison in the Federalist, No. 44, stated the same thing:

> "The power to make anything but gold and silver a tender in payment of debts, is withdrawn from the states on the same principle with that of issuing paper currency."

The contract clause is *not* an absolute prohibition like those clauses and has nothing to do with *medium* of payment. Elliot's Debates, Vol. 5, p. 485. There is a far larger and different question involved herein than impairing a contract, namely, whether, in the face of this tender prohibition (and other clauses later discussed discussed) the forty-eight states may provide that as to future debts local valuations may be a 100% substitute for money by a *solvent* or insolvent debtor in paying such debts during *good* times and bad where real estate was theretofore given by the debtor as security for such loans. The *Honeyman* and *Wachovia* cases cannot be determinative of that point, for, as declared in *Dewey v. Des Moines,* 173 U. S. 193 at 200:

> "* * * A point that was never raised cannot be said to have been decided adversely to a party

who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of."

Webster well stated what is involved herein in *Ogden v. Saunders,* 12 Wheat. at pp. 247, 248, 251: (And all seven Justices in five written opinions agreed with him, *Ibid.* 265, 288, 306, 328, 329, 336.)

"* * * Commerce, credit and confidence, were the principal things which did not exist under the old confederation, and which it was a main object of the present Constitution to create and establish. *A vicious system of legislation, a system of paper-money and tender laws, had completely paralyzed industry,* threatened to beggar every man of property, and ultimately to ruin the country. * * * The object of the new Constitution was to arrest these evils; to awaken industry, by giving security to property; to establish confidence, credit and commerce, by salutary laws, to be enforced by the power of the whole community."

* * * * * * *

"* * * One of the first powers given to Congress, therefore, is that of coining money, and fixing the value of foreign coins; and one of the first restraints imposed on the states, is the total prohibition to coin money. These two provisions are industriously followed up and completed, by denying to the states *all* power of emitting bills of credit, or of making anything but gold and silver a tender in the payment of debts. The *whole* control, therefore, over the standard of

value, and *medium of payments,* is vested in the general government."

* * * * * * *

"* * * Can a state make anything but gold and silver a *tender* in payment of *future debts? This nobody pretends.*"

The enduring reasons making valuations a bad substitute for money include the following: Self-interest of the local valuers or valuer, local pressure on them, prejudice against the local or distant creditor, and perjury as to valuations. This Court protects the national government against this very thing. Thus in *Helvering v. Midland Mutual Life Ins. Co.,* 300 U. S. 216, the Court denied the right of the mortgagee to prove values of the real estate he purchased at foreclosures, his contention being he paid too much for them. This Court there said:

"The administration of the income tax law would be seriously burdened if it were held that when a mortgagee bids in the property for a sum including unpaid interest, he may not be taxed on the interest received except upon an inquiry into the probable *fair market value* of the property. *'At best, evidence of value is largely a matter of opinion, especially as to real estate.' Montana R. Co. v. Warren,* 137 U. S. 348, 353, 34 L. ed. 681, 11 S. Ct. 96."

2. THE OPINION OF THE COURT BELOW STRIKES FROM THE TENDER PROHIBITION ONE-HALF ITS FORCE BY HOLDING IN EFFECT THAT IT MEANS: "NO STATE SHALL MAKE ANYTHING BUT GOLD AND SILVER COIN A TENDER IN PAYMENT OF UNSECURED DEBTS." THIS NEW AND EXTRAORDINARY INTERPRETATION ALONE JUSTIFIES A HEARING ON THIS VERY IMPORTANT FEDERAL QUESTION.

The lower Court in effect construed the tender prohibition to mean nothing more than the following:

> "No state shall make anything but gold and silver coin a tender in payment of *unsecured* debts."

Never before has there been such an interpretation. This takes from the prohibition more than one-half its force. Private debts secured by mortgage are the largest class of private debts in the United States. (Clark, on *The Internal Debts of the United States* (20th Century Fund, 1933), pp. 5, 6.)

This case, involving the tender clause, is the counterpart of the famous cases, *Craig v. Missouri,* 4 Pet. 410, 7 L. ed. 903, and *Briscoe v. Kentucky,* 11 Pet. 257, 9 L. ed. 709, involving the *twin* prohibition against state paper money.

Congress may not authorize a state to issue state paper money for any purpose, nor may it authorize a state to provide that valuations of local property may be used to pay debts because, as Madison pointed out, it has no power to do so.

State paper currency issued by a legislature as a substitute for national money and based on something of value, and valuations made in local courts, based on real estate, and likewise used as *a substi-*

tute for national money in discharging an obligation to pay money, are obviously of the same essence, are both bad substitutes for money. This is the reason the framers of the Constitution voted unanimously to make all valuation laws void equally with state coinage laws and state paper money laws. (Elliot's Debates, Vol. 5, 484.)

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3. **CONGRESS HAS POWER TO MAKE, AND HAS MADE, NATIONAL MONEY THE EXCLUSIVE MEDIUM FOR PAYING ALL UNSECURED AND SECURED DEBTS. THE STATE STATUTE ATTACKED HEREIN PROVIDES THAT "WHEN A MONEY JUDGMENT IS SOUGHT" FOR THE BALANCE DUE AFTER A TRUSTEE'S SALE, A VALUATION OF THE REAL ESTATE MAY BE SUBSTITUTED FOR MONEY IN PAYING OR CANCELLING THAT OBLIGATION TO PAY MONEY. THE CONFLICT IS PLAIN.**

> "By the Constitution of the United States, the several states are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. *But no intention can be inferred from this to deny to Congress either of these powers.*" (Juilliard v. Greenman, 110 U. S. 421, at p. 446, 28 L. ed. 204, at p. 214.)

The national government, that case also holds, has *exclusive* power to coin metals into money, issue paper money, and make this national money a tender in payment of *all* debts in the United States. Nothing is anywhere said there or elsewhere that such money is merely for payment of all unsecured debts in the United States. Thus, when Congress passes money laws, it frequently adopts the wording of the tender

prohibition and provides what may be a tender "in payment of *all* debts, public and private, within the United States." (Jur. St. p. 7.) The legal tender cases and the gold clause cases (*Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 79 L. ed. 885) likewise declare that this national power over the *medium* of payment of debts excludes the acts of individuals and states from modifying or limiting that power in any way. This principle applies to a debt secured by *mortgage. Guaranty Trust Co. v. Henwood,* 307 U. S. 247, 83 L. ed. 1266. All this is merely what Story said, that the three money prohibitions were to give the national government this exclusive power (Section 1372, quoted by the lower Court herein), what Webster said, *supra,* and what is universally recognized. This is a clear, additional reason why a hearing on the merits should be granted herein. Confusion and conflict now exist.

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4. **THIS CONSTITUTIONAL PLAN OF MAKING DEBTS PAYABLE ONLY WITH MONEY IS THE HONEST AND JUST PLAN AND UNTIL NOW HAS NEVER BEEN DEPARTED FROM SINCE THE CONSTITUTION WAS ADOPTED. THE USE OF LOCAL VALUATIONS AS A SUBSTITUTE FOR MONEY IN PAYING DEBTS ALWAYS HAS AND ALWAYS WILL CAUSE IMMENSE AND UNJUSTIFIABLE LOSSES. THE CONTEST HEREIN IS: NATIONAL SOVEREIGNTY vs. STATE SOVEREIGNTY AS TO THE MEDIUM FOR PAYING FUTURE DEBTS.**

The constitutional plan is an honest and just plan; the valuation plan is the opposite. The defaulting mortgagor may be adequately protected not only by confirmation of sale procedure, which this Court in the *Wachovia* case held was *"fair to both parties,"*

but by four other classes of state laws: Redemption laws, moratorium laws, upset price procedure, and other state laws providing that if the mortgagee is the purchaser he must credit on the unpaid balance of the debt any profit he makes by reselling the property.

"Debts and taxes must be paid with the *substance* and not the shadow," wrote Washington to Madison in 1786*, stating that it was these substitutions of valuations for money that were "extremely hurtful and among the principal sources of the evils and corruption of the present day." Madison, answering that letter and agreeing with Washington on that point**, stated also that he had just opposed and helped defeat a proposed Virginia valuation law "for making property a tender in payment of debts at four-fifths its value." Valuations made in local courts and used as money to pay debts always have been, and it is fair to say always will be, grossly unjust. The contest herein is: National sovereignty vs. state sovereignty, as to the medium for paying future debts.

CONCLUSION.

As this appeal does *not* involve the *contract clause*, but does involve the construction and effect of the tender and money clauses of the Federal Constitution and its application to a state statute upon a point which has never been passed upon or decided by this

*Bancroft, *History of the Formation of the Constitution of the United States*, Vol. 1, 239.
**Writings of James Madison* (Hunt's Edition), Vol. II, p. 301.

Court, it is sincerely urged that Appellant is entitled under Section 237(a) of the Judicial Code to, and should be granted, a hearing upon the merits.

Dated, San Francisco, California,
November 4, 1940.

Respectfully submitted,
JOHN H. RIORDAN,
CHARLES H. WHITE,
Counsel for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is presented in good faith and without intent to hinder or delay the progress of the above entitled proceeding.

Dated, San Francisco, California,
November 4, 1940.

JOHN H. RIORDAN,
CHARLES H. WHITE,
Counsel for Appellant and Petitioner.